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Third Party Contracts in the Civilian Tradition & in Roman Dutch Law

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(This is the text of the Lecture delivered by Professor Jan Hallebeek, Professor of Roman Dutch Law of the Free University of Amsterdam at the Symposium organised by the Bar Association of Sri Lanka in collaboration with the Netherland Alumni Association of Lanka and Royal Netherlands Embassy in Sri Lanka on 26th February 2000, at the Sri Lanka Foundation Institute Auditorium).

I. Introduction

IN many European systems of law, contracts in favour of a third party are nowadays considered to be valid. This also holds true for the Netherlands. Article 253 of book six of the Dutch Civil Code, which was introduced in 1992, prescribes that such a contract can be enforced by the third party after accepting it. However, other civil codes are sometimes more reluctant. The French Code civil, for example, merely acknowledges a contract in favour of a third party in two exceptional cases: if one, at the same time, also stipulates a certain performance for oneself and, secondly, if one donates under the condition that the donee will make a certain performance towards a third party (art. 1121). However, in modern literature it is generally accepted that a profit moral, a moral profit for the stipulator, suffices to render the contract valid. Whereas American law acknowledged the validity of third party contracts already in the nineteenth century, English law was until recently characterized by the so-called 'privity of contract', which implies that only the parties to the contract can derive rights from it. However, this is expected to change rather soon, since there is a report of the Law Commission aimed at introducing contracts in favour of a third party into English law.[1]

In this paper I would like to deal with the historical development of the idea that parties to a contract can indeed stipulate in favour of a third party. I will start with Roman law and the medieval interpretation of the Roman texts, and subsequently deal with the teachings of Grotius, the doctrine of the Roman-Dutch jurists and the case-law of the Supreme Court of Holland and Zealand in the seventeenth and eighteenth centuries. I will conclude my paper with some remarks concerning the later developments in the Netherlands and contemporary Dutch law.

II. Roman law

Our modern contract in favour of a third party is by no means an invention of the Roman jurists. Due to the closed system of a restricted number of contracts giving rise to obligations in classical law, which is still strongly perceptible in the *Corpus iuris*, only two legal conceptions are theoretically qualified for constructing a third party contract, viz. the stipulation, a contract emerging from formal phrasing but capable of making any performance enforceable, and the pactum adiectum, the informal pact added to juridical acts. However, in Roman law there are two obstacles preventing the use of these means for such a purpose. For the stipulation there is the rule of law prescribing that nobody can stipulate something for a third party: alteri stipulari nemo potest.

Inst. 3.19 (de inutilibus stipulationibus). 19[2]

> Alteri stipulari, ut supra dictum est, nemo potest: inuentae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur, nihil interest stipulatoris. (...)

However, if the stipulator himself has an actionable interest in the conclusion of the stipulation in favour of someone else, the stipulation is valid, although it only effects the parties to it.[3] Moreover, it is also possible to stipulate for a third party, while adding a penalty-clause. One stipulates for oneself the payment

of a penalty for the case of non-compliance, i.e. if the performance to the third party fails to occur.[4]

The maxim *alteri stipulari nemo potest* seems to refer only to stipulations, not to the *pacta adiecta*.[5] However, also when pacts in favour of a third party are considered as valid according to the Roman texts, it appears that most of the time the one who insisted on the right for the third party, had an interest in the performance himself.[6]

A second obstacle exists in a legal principle which is phrased less explicitly, but which clearly underlies a number of decisions in the *Corpus iuris*, i.e. that no obligation can arise towards a person who is not a party to the contract.[7] Apparently the Roman jurists assume that parties entering into a contract are merely representing themselves and can merely acquire what is in their own interest. This implies that some modern legal concepts from this viewpoint of Roman law are quite unthinkable: not only contracts in favour of a third party, but also direct representation and life insurance. Apart from the money loan - it was accepted that the debtor could directly be sued by a third party in whose name the money was paid out[8] - exceptions to this legal principle, granting the third party an action, are only sporadically accepted in the Corpus iuris.[9]

Nevertheless, in the continental European ius commune preceeding the national Codes of civil law, it was eventually accepted as a principal rule of law, that contracts in favour of a third party are valid and enforceable. It has been no easy job to come to this conclusion on the basis of the texts from the *Corpus iuris* itself. Legal scholarship needed several centuries to reach this goal.

III. Medieval Interpretation

From the twelfth century onwards Roman law was studied and taught in the first schools of law and legal faculties, starting at Bologna in the North of Italy. As just described, there were two major obstacles for the construction of contracts in favour of a third party. However, the *Corpus iuris* also displays a number of exceptional cases where the third party is indeed granted an action.

The medieval glossators of Roman law noticed these exceptions and for didactical reasons started making lists of such cases.[10] This approach, for example, can be found in the *Casus codicis* of William of Cabriano, a glossator who is believed to describe faithfully the teachings of his master Bulgarus de Bulgarinis († 1166). William indicates that in every exceptional case there is a *ratio specialis*, a special reason, to grant an action to the third party. An example is the *affectio*, the affection which induces a grandfather to stipulate the restitution of the dowry in favour of his grandchildren. Since every specific exception is characterised by a *ratio* of its own, it is not permitted to apply the exceptional cases analogously or to regard these cases as the expression of a general principle of law, which can be developed into a new basic rule,[11] because in that case, as William fears, the law will be offended.[12] This way of thinking of Bulgarus, reproduced here by his student William of Cabriano, is followed by the vast majority of glossators.

Only one glossator appears to be willing to put aside the rule *alteri stipulari nemo potest* on the basis of the exceptions in the *Corpus iuris*. His name is Martinus († before 1166).[13] The opinion of Martinus is recorded in the collection of *dissensiones dominorum*, ascribed to the glossator Hugolinus de Presbyteris († after 1223). Martinus seems to have been part of a disagreement between himself and others, like Azo Portius († 1220), concerning the question whether direct representation can be achieved by means of a procurator. Subsequently the question is raised whether someone can derive an *actio utilis* from the contract another person entered into (*ex alieno pacto*) in his favour. Martinus maintains that this is indeed the case, thereby referring to two texts from the *Corpus iuris*. The first deals with the condition to return the thing handed over in deposit to a third party (C. 3.42.8), the second with the condition to pass through the thing donated after a certain period to a third party (C. 8.54(55).3). In both cases the third party is granted an *actio utilis*: in the first case because of equity, in the second case because of a benevolent interpretation of the law. The other three of the *quattuor doctores*, Bulgarus, Hugo († before 1171) and Jacobus († 1178), reject this opinion of Martinus and maintain that the texts just referred to are exceptional cases where Justinianic law explicitly allows an *actio utilis*. Apart from these cases, however, one should stick to the legal principle, that a third party cannot derive an action from a contract he did not enter into.[14] If we may believe later glossators, such as Azo, Odofredus de Denariis († 1265) and Accursius († 1263), Martinus generally accepted the validity of third party contracts and always (semper) granted the third party an action.[15]

Which way of reasoning induced Martinus to his teachings? Probably he took the two exceptional cases mentioned in the *dissensiones dominorum* as a starting point.[16] However, there are more of such exceptions in the *Corpus iuris* and, according to Martinus, there are even so many that it is justified to consider these exceptions henceforth as the principal rule.[17] But why is it then possible that in many other texts in the *Corpus iuris* the third party is explicitly denied to have an action at his disposal? According to Martinus these texts merely pronounce upon the *actio directa*, not upon the *actio utilis* and the solution of the *Corpus iuris*, viz. that the third party has no *actio directa*, is, according to Martinus, the solution of strict law, the *ius strictum*. On the basis of equity, the *aequitas*, the third party does have an action at his disposal, i.e. an *actio utilis*.[18]

The equitable argument of Martinus is rejected and opposed by his contemporary Bulgarus and the vast majority of later

glossators. As already seen, his teaching on the validity of third party contracts was already rejected by the other three of the *quattuor doctores*.[19] Azo qualifies the opinion of Martinus concerning the contract in favour of a third party as false (*falsum*),[20] a view Accursius will endorse in later times.[21]

Which arguments are adduced by all these glossators in order to reject the doctrine of Martinus? First of all, they stick to the exceptional character of all cases in the *Corpus iuris* where the third party is granted an action. Time and again they remark that we are dealing here with exceptions deviating from the standard case: it is something extraordinary (*speciale*), that the third party derives an action from the contract in his favour.[22] Moreover, Azo adduces the argument already formulated by William de Cabriano, namely that the exceptions should not develop into a new principal rule of law (*specialia non sunt trahenda ad consequentiam*).[23] Finally the entire reasoning that if there is no action according to strict law, on the basis of equity an actio utilis is still available, is qualified in the Gloss as void.[24]

With sharper criticism the glossators oppose Martinus' use of notion equity. According to Azo the equity referred to by Martinus when granting the third party an *actio utilis* is an *aequitas cordis*, an equity from the heart.[25] Martinus is reproached here to follow the personal equity of his own conscience, the *aequitas rudis*, the equity not yet expressed in the wording of the law.[26] After all, according to the majority stand of the glossators, the *aequitas rudis* may not prevail over the strict interpretation of the law. Also other qualifications of the equity adduced by Marinus elucidate that his opponents accuse him of following the *aequitas rudis*. Martinus wants to judge according to his own conscience.[27] His equity is feigned and false (*aequitas ficta, aequitas falsa*).[28] His equity comes out of his own pocket (*aequitas bursalis*).[29]

The many rejections of Martinus' teachings in the Gloss had both negative and positive effects. It was negative in the sense that the Gloss was for centuries such an authoritative text that nobody dared to bring up again the arguments of Martinus. It was positive in the sense that Martinus' doctrine - albeit presented as false doctrine or misconception - was spread over Europe and, therefore, in a position to inspire later generations of learned jurists.

Based upon totally different arguments, a number of Martinus' teachings eventually became predominant, were generally accepted in the civilian doctrine and found their way through the codifications of civil law in the nineteenth century to contemporary systems of law in continental Europe.

The contract in favour of a third person is also eventually accepted. From Bartolus de Saxoferrato (1313-1357) the commentators start to grant actions to the third party on a larger scale. This is done, however, not in conformity with the constructrion of Martinus as *actiones utiles* based on equity - that doctrine was rejected by the Gloss - but in other ways. An extensive application of the *actio institoria* paved the way for the acceptance of direct representation. Similarly the way was paved for the general acceptance of third party contracts. It was assumed, for example, that contracts in favour of a third party anyhow give rise to a natural obligation towards the third party, which by means of an oath could be transformed into a civil obligation. Moreover, every stipulator was presumed to have an interest in the performance due to a third party.[30] By the end of the Middle Ages the Roman maxim *alteri stipulari nemo potest* had already lost much of its practical significance in the civilian tradition.

As we can see, the fact that the third party has an action at his disposal against the promisor can dogmatically be explained in several ways. Apart from the assumption of a natural obligation or the presumption of an interest, there are in fact only two possible explanations for the origin of the right of the third party, at least if we stick to the Roman subdivision of the sources of obligation. One could defend that he derives his right not directly from the contract made in his favour, but from the stipulator. It is the latter who acquires a right and is capable of transferring this right by means of cession to the third person. This is in fact an explanation we can already find in medieval scholarship. One can even presume the cession to have taken place. As a consequence the third party can sue the promisor. However, there is also a different explanation. The third party derives his right directly from the contract and not from the person of the stipulator. Following this line of reasoning, the third party himself in one or another way enters into the contract. The contract in his favour can be seen as an offer he can accept and by doing so he becomes party to the contract.

IV. Hugo Grotius

First of all we will have a look at the teachings of one of the most influential Dutch jurists of the seventeenth century, Hugo Grotius (de Groot, 1583-1645). In two of his works we can trace fragments related to the third party contract, viz. in the *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, 'Introduction to the jurisprudence of Holland', composed during Grotius' captivity at Loevenstein castle in the years 1619 until 1621, but published only in 1631, and in his work *De iure belli ac pacis*, 'On the law of war and peace', published for the first time in 1625.

In the *Inleidinge*, Grotius' starting point is the Roman rule *alteri stipulari nemo potest*. Here he uses two Dutch words for the Latin *stipulari*, viz. *bedingen*, to stipulate, and *aennemen*, to accept. There is no fundamental difference between the two. In case of 'stipulating' the initiative to acquire a right for a third party is taken by the stipulator, not by the *promittens*. In case of 'accepting' the initiative seems to have been taken

by the *promittens*, viz. by making an offer. It is clear, that the words *bedingen* and *aennemen* are not used here as related to the stipulation as a specific Roman contract, but to contractual agreements in general.

In spite of the fact that Grotius apparently adheres to the Roman maxim as a principal rule, it seems to have only little practical significance in view of the many exceptions to the rule which are subsequently brought up. First Grotius refers to some exceptions he already discussed before (in book 3.1 § 38 of the *Inleidinge*): a woman can acquire a claim through her husband and parents through their children. In a similar way tutors and administrators of merchants can be forced to transfer the claims they acquired in their capacity. A second exception mentioned by Grotius are the things stipulated in God's service, or for the benefit of the poor. It was disputed among the jurists of the fifteenth and sixteenth centuries, whether it was valid to stipulate in favour of charitable ends (*piis locis*) or of the paupers (*pauperibus*). However, Grotius also acknowledges such agreements as valid exceptions to the Roman maxim. Subsequently the well known exceptions already accepted in Roman law and the civilian tradition are mentioned: the *accipiens* has an interest himself in the performance towards the third party, or a penalty-clause is added to the agreement.

It is interesting to see that at this point Grotius seems to be inspired by the opinion of Martinus Gosia, which, as we have seen, was preserved in numerous places in the Accursian Gloss. A distinction is made between equity and the sharpness of the law and in view of equity the third person is generally, i.e. apart from the exceptions already mentioned, entitled to accept the promise made in his favour and by doing so he obtains an enforceable right. The distinction between equity and strict law seems to be derived from the doctrine of Martinus. However, Grotius seems to elaborate this doctrine further. For the cases in the civilian tradition where it was generally accepted that the third party could sue the *promittens*, there was no need for the third party to accept the promise, whereas the *promittens* could not revoke his promise. In the other cases, not yet generally accepted as exceptions to the maxim *alteri stipulari nemo potest*, where only Martinus was prepared to grant an action, the third party has, according to Grotius, to accept the promise explicitly whereas until that moment it can be revoked by the *promittens*.

It seems that the third party in such cases derives his right by an act of himself, i.e. independant from the wish or an act of the *accipiens*. Anyhow, in this fragment it is not made clear, that the *accipiens* plays a certain role in transferring the right to the third party. Which dogmatic substantiation would Grotius have had in mind, when writing these lines? Should we assume the consent of the *accipiens*, thereby transferring the right he acquired from the contract by means of a cession to the third party who merely has to accept, i.e. declare not to have any objections? If so, the third party derives his right from the *accipiens*. Or should we assume that, since Grotius makes no mention here of the person of the *accipiens*, the latter's consent is irrelevant and the acceptance by the third party suffices? If so, the third party derives his right from the contract made for his benefit and more or less enters into it by his explicit acceptance. Unfortunately, the text by Grotius is too dense and cryptic to give a decisive answer to these questions.

Hugo de Groot, Inleidinge tot de Hollandsche Rechts-Geleerdheid 3.3 § 38 [31]

> Maer slechtelick iet te bedingen of aen te neemen voor een derde, (uitgenomen voor die ghenen den welcke inschuld door eens anders daed kan aenkomen, waer van hier vooren is gesproocken) is krachteloos, ten zy zulcks gheschiede ten dienste Gods, ofte voor den armen, ofte dat den aennemer zelve daer aen zy gelegen: of dat daer een straffe by gestelt zy, die den toezegger zal moeten dragen zoo hy zulcks niet en deede: maer alzoo by ons meer werd gezien op de billickheid; als op scherpheid van rechten, zoude oock buiten deze uitzonderingen een derde de toezegginge moghen aenneemen, ende alzoo recht bekoomen; ten waer den toezeggher voor de aenneeming van de derde zulcks hadde wederroepen.

A second fragment related to third party contracts can be found in Grotius' work *De iure belli ac pacis*. In this passage a distinction is made between two different ways of formulating the promise.[32] These two different phrasings correspond with formulations of the stipulation as used in medieval doctrine. The promise made towards the *accipiens* to give something to a third party reminds of the stipulation *promittis mihi quod dabis illi*. The promise directed to the name of the third party reminds of the stipulation *promittis illi quod dabis ei*. In fact we are dealing here with the basis of our modern distinction between third party contracts and agency. The stipulation on the *accipiens'* own name corresponds with the contract in favour of a third party, while the stipulation phrased as directed to the third party correspondends with agency. It is interesting to see that Grotius for the first of these stipulations explicitly puts aside the requirement of Roman law for its validity, i.e. that the accipiens himself should have a financial interest. Independant of whether this is the case or not, by nature the agreement has legal consequences.

Which are the rights now resulting from the promise to the *accipiens* in favour of a third party? It is striking to see that Grotius not only speaks here about the acceptance by the third party, but also about an acceptance by the *accipiens*. However, he does not state that the *accipiens* through this acceptance is entitled to the performance as promised. Neither does he

pronounce upon the question whether the third party has acquired a right after the *accipiens* accepted. The only thing we know for sure is that the *accipiens* by his acceptance acquires the right to grant the third party the right to the performance by the *promittens*, i.e. if also the third party accepts explicitly. Moreover, after the acceptance by the *accipiens*, the *promittens* is no longer entitled to revoke his promise, although the *accipiens* may absolve him from his promise.

It is questionable, however, in which way the third party acquires his right: from the *accipiens* or is the *promittens* directly obligated to the third party? The fact that the third party is not capable of acquiring any right without an explicit act or expression of the *accipiens*' will may indicate that the right is derived from this *accipiens* by a certain way of cession. On the other hand, the *accipiens* after his acceptance seems to have no other right towards the *promittens* than to prevent him from revoking his promise and a right one does not have cannot be transfered to another by cession. This would indicate that the third party by his acceptance is entering into the contract. After all, the necessary act of the *accipiens* can also be seen as a method of offering the contract made in favour of a third party to the latter for acceptance. Anyhow it is clear that after the promise is made the *promittens* is entitled to revoke his promise until it is accepted by the *accipiens*. After such an acceptance, the *accipiens* has to make a choice and either dismiss the *promittens* from his promise or to allow the third party to exercise the right promised in his favour. However, the third party has to accept the promise in order to acquire the right to enforce it.

Hugo de Groot, De iure belli ac pacis, Lib. II, cap. xi, § 18 [1][33]

Solent et controversiae incidere de acceptatione pro altero facta: in quibus distinguendum est inter promissionem mihi factam de re danda alteri, et inter promissionem in ipsius nomen collatam cui res danda est. Si* mihi facta est promissio, omissa inspectione an mea privatim intersit, quam introduxit ius Romanum, naturaliter videtur mihi acceptanti ius dari efficiendi, ut ad alterum ius perveniat, si et is acceptet: ita ut medio tempore a promissore promissio revocari non possit; sed ego cui facta est promissio eam possim remittere. Nam is sensus iuri naturae non repugnat, et verbis talis promissionis maxime congruit. neque nihil mea interest si per me alter beneficium acquirat.

* Covarr. c. quamvis. p. 2. § 4. n. 13.

If we compare the two fragments, i.e. the one from the *Inleidinge* and the one from *De iure belli ac pacis*, we can conclude that the Roman maxim *alteri stipulari nemo potest* is not explicitly declared to be abrogated or void, but has lost all its practical significance. Both texts generally grant the third party an action against the *promittens*. Apart from the exceptional cases of Roman law, the action of the third party is in the *Inleidinge* based upon equity, in *De iure belli ac pacis* upon Natural Law. Unlike the exceptional cases of Roman law, mentioned in the *Inleidinge*, for both these acquisitions, i.e. based on equity or Natural Law, acceptance by the third party is a requirement for the emergence of such an actionable right. However, according to the *Inleidinge* the *promittens* may revoke his promise until it is accepted by the third party, whereas according to *De iure belli ac pacis* he can do this only until it is accepted by the *accipiens*. Moreover, in the *Inleidinge* Grotius does not pay any attention to the role of the *accipiens* in granting the third party his right, whereas in *De iure belli ac pacis* the explicit consent of the *accipiens* is of the utmost importance. These differences can be explained in several ways. After all, the *Inleidinge* is supposed to contain Grotius' description of the indigenous law of Holland, whereas in *De iure belli ac pacis* he is merely describing his concept of Natural Law. One could also reason that within Grotius' doctrine a certain development took place. As we have seen, the text in de *Inleidinge* is unclear as regards the question where the right of the third person is derived from: from the *accipiens* or from the contract itself? The text in *De iure belli ac pacis* seems to elaborate further on this dogmatic issue. By his acceptance, the third party seems to enter into the contract made in his favour, but this can only take place after the explicit approval by the *accipiens*.

Grotius is considered to have been an influential and authoritative author during the entire seventeenth and eighteenth centuries. It has to be seen now, whether his doctrine was adopted by the authors of Roman-Dutch law and in the case-law of the Supreme Court of Holland and Zealand.

V. The doctrine of Roman-Dutch law

As seen in Grotius' work the maxim *alteri stipulari nemo potest* was not put aside, but had lost a lot of its practical significance. This was the result of granting the third person a right on the basis of equity or Natural Law. There were, however, other dogmatic ways that could lead to the same result. One of those, which we can find in the authors of Roman-Dutch law, is clearly inspired by late medieval legal scholarship. As we have seen, the commentators of Roman law were already inclined to presume that every *accipiens* has an interest by himself in the performance towards the third party. Through this line of reasoning the maxim *alteri stipulari nemo potest* was not abrogated, but it was largely deprived of its practical, forensic importance.

Such an approach can, for example, be found in Simon Groenewegen van der Made (1613-1652), secretary of the city of Delft. In his work *De legibus abrogatis* (1649), dealing with Roman laws which are abrogated or become obsolete in the

Province of Holland, he maintains that no one is so senseless that he stipulates for another without having himself some kind of interest. Thus, the requirement of interest is not rejected here, nor is the maxim *alteri stipulari nemo potest* regarded as abrogated. However, if usually the stipulator has an interest of his own as a consequence contracts in favour of a third party, can most of the time be qualified as one of the exceptional cases of Roman law where the contract is valid.

Simon Groenewegen, De legibus abrogatis, Justiniani Institutiones Bk. 3, tit. 20, § 19 [34]

1 Alteri stipulari nemo potest.

2 inventae enim sunt huiusmodi stipulationes vel obligationes ad hoc, ut unusquisque acquirat sibi, quod sua interest: ceterum si alii detur, nihil interest stipulatoris *hic*.

3 futilis me hercule ratio. charitas non quaerit quae sua sunt. 1. Cor. 13.5. cur igitur inventae sunt huiusmodi stipulationes ad hoc, ut unusquisque sibi tantum acquirat? adhaec falsum est quod si alii detur, nihil interest stipulatoris: cum beneficio adfici hominem intersit hominis, *ut dicitur in l. 7 servus, in fin. D. de serv. export. arg. l. 3 ut vim, in fin. D. de just. et jur.* et nemo tam demens, ut alteri stipuletur, nisi id sua quoque interesse existimet.

According to medieval doctrine this presence of an interest for the *accipiens* would make the stipulation valid and would enable the *accipiens* to transfer his rights derived from the contract by a cession to the third party. Also Groenewegen is prepared to grant the third person an action. He discusses, however, the possibility that there is no obligation whatsoever between *accipiens* and *promittens* and, consequently, the third party's claim has to be explained in a totally different way, which by the way is also inspired by medieval doctrine. After all, the commentators qualified the relationship between *promittens* and the third party as a natural obligation. In a similar way Groenewegen considers it to be a nude pact. The natural obligation could by taking an oath be converted into a civil obligation, but a nude pact gives - at least according to modern customary law - by itself already rise to an action. For that reason also the contract in favour of a third person results in an enforceable obligation.

Simon Groenewegen, De legibus abrogatis, Justiniani Institutiones Bk. 3, tit. 20, § 19 [35]

4 Alia igitur hujus textus ratio excogitari posset, nimirum ex stipulatione alteri facta obligationem non adquiri stipulatori, quia hoc actum non est: neque alteri, quia inter eum et promissorem stipulatio non intervenit: ideoque quoad ipsum dicta promissio tantummodo est pactum nudum, ex quo jure civili actionem non nasci constat, *l.* 10. *legem C. de pact.* (...)

6 Hinc moribus hodiernis ex nudo pacto datur actio. *dixi in dict. l.* 10. *legem. C. de pact.* et stipulando alteri obligatio adquiritur, Grot. *Int. l. 3. n.* 78 *et de jur. belli l.* 2. *c.* 11 *n.* 18. Covar. *in c. quamvis. part.* 2. §. 4 n. 2. Fab. *C. l.* 4 *tit.* 34 *defin.* 1. Gutier. *l.* 3 *pract. quaest.* 97 *n.* 7, Gomez. tom. 2 Resol. c. 11 n. 20. circa fin. Charond. l. resp. 46. Vide quoque Zipae. Not. jur. de contrah. et commit. stip. Vinn. in § 4. si quis alii. n. 3 hoc. tit. Ritterhus. de Differ. jur. l. 3 c. 6. DD. hic et in l. 38 stipulatio. § alteri. D. de verb. obl. Gabriel. l. 3 de Verb. obl. concl. 1 et quae dixi in l. 1 C. Per quas Person. cuique.adq. et in l. 6. multum. in fin. C. si quis.

Thus, dogmatically in a different way, Groenewegen comes to almost the same conclusion as Grotius did, i.e. that the maxim *alteri stipulari nemo potest* has only little practical significance. Most of the time, the contract in favour of a third party will be valid and the third party will have an action at his disposal. This is not based on equity or Natural Law, but on the fact that normally the *accipiens* has an interest in the performance to the third party, resulting in an enforceable nude pact between *promittens* and the third party.

It is not contrary to the teachings of Grotius that in such a case, i.e. where the contract is valid because it is regarded as one of the exceptional cases of Roman Law, there is no need for an explicit acceptance by the third party. Neither did Grotius require such an acceptance. This was merely a condition for the third party's action based upon equity or Natural Law, at least if we interpret the text from the *Inleidinge* against the background of Grotius' doctrine in *De iure belli ac pacis.* Groenewegen anyhow merely deals with the exceptional case and does not pronounce upon acceptance by the third party.

Also according to the *Censura Forensis* (1662) of Simon van Leeuwen (1625-1682) the third party will acquire an actionable right. However, this right may have various origins. Just as Groenewegen,[36] van Leeuwen also refers to the bills of exchange as used in mercantile practice. It is valid to stipulate in general for whomever will hand over the bill (*in genere cuicunque literarum latori*). Here it is stated that one can not only correctly pay to the third party, i.e. the one who holds the bill in good faith, but the latter even has an action. Whereas Groenewegen did not try to make clear where this action is derived from, van Leeuwen considers the holder of the exchange bill to be the representative (or the cessionary?) of the drawer. In this respect van Leeuwen seems to deviate from the doctrine of Grotius.[37]

In another passage in the *Censura Forensis*, we can trace an approach quite similar to the one of Groenewegen. Yet, compared to Groenewegen, van Leeuwen goes one step further by presuming every stipulator to have an interest.[38] He states

clearly that no one may be presumed to stipulate for another without an interest of his own. As a consequence, contracts in favour of third parties are effective and will result in a valid obligation. Although van Leeuwen here merely states that an action is available without pronouncing upon the person entitled to it, the references and the context make clear that he must have had the third party in mind, not the *accipiens*.

Simon van Leeuwen, Censura Forensis, Lib. IV, cap. 16 (de verborum obligatione) n. 8[39]:

> Nemo alteri stipulari potest, nisi et ejus intersit, (...) vel poena sit subjecta (...). Verum, quum ex nudo pacto hodie efficax detur actio, ut suo loco demonstravimus, licet subtili Jure, ex stipulatione alteri facta stipulatori non acquiritur, quia hoc actum non videtur, nec alteri, quia inter eum et promissorem stipulatio non intervenit: quia tamen nemo praesumitur alteri stipulari, nisi et ejus intersit, idque actum esse sufficiat, (...). Alteri stipulando efficax obligatio et actio acquiritur, haud secus, quam si solutionis causa alterius persona sit adjecta40 (...). Dissentit tamen Carpzov. (...), ubi tertio inde acquiri negat. (...).

By van Leeuwen's fiction the exceptional case of Roman law, where the third party contract is valid, i.e. where the *accipiens* has an interest of his own, is adopted as the standard situation. When every *accipiens* for a third party is presumed to have an interest, every contract in favour of a third party has to be presumed to be valid and enforceable by the third party. Without puting the interest requirement aside, it is consequently deprived again of its significance, whereas the maxim *alteri stipulari nemo potest* is further eroded.

In his commentary on the Digest (first edition 1698-1704), Johannes Voet (1647-1713), professor of law at Utrecht and in later times at Leyden, first of all describes the *accipiens* as a representative (*procurator*) of the third person, the principal (*dominus*), and maintains that the latter has an action against the *promittens* even without any cession. These words seem to adopt the *stipulatio alteri* as a kind of representation.

Johannes Voet, Commentarius ad Pandectas, Liber 45 tit. 1 § 3[41]:

> (...) moribus hodiernis obtinuit unumquemque alteri aeque ac sibi, posse stipulari, adeo ut et domino ex stipulatione procuratoris agere liceat, etiamsi actio ei a procuratore cessa non sit (...).

Subsequently, Voet states that nowadays the third party acquires an action to claim the entire amount, if he is the only beneficiary. Just as the other authors he refers to the bills of exchange used in legal practice. However, it is not clear here in which way the third party acquires his right: by entering into the contract? by an enforceable nude pact? through the *accipiens* as his representative? or by means of a cession?

Johannes Voet, Commentarius ad Pandectas, Liber 45 tit. 1 § 3[42]:

> Ac proinde, licet jure civili in casu, quo quis *sibi aut Titio dari* stipulatus erat, nulla Titio, sed soli stipulanti, obligatio et actio quaesita censeretur, (...) hodie tamen in hisce Titio adjecto non modo recte solvitur, sed et actio in solidum quesita est; aut pro parte, si quis *sibi et Titio* stipulationem fecerit; nihilque inter mercatores frequentius esse, quam ut non modo sibi, sed et alteri, veluti syngraphae aut literarum cambialium latori, solvi stipulentur (...).

When we compare the opinions of Groenewegen, van Leeuwen and Voet with the doctrine of Grotius, we can conclude that all authors have one thing in common, viz. the inclination to acknowledge generally third party contracts as valid, but without declaring explicitly that the Roman maxim *alteri stipulari nemo potest* has to be considered obsolete. However, the authors mentioned come to almost the same conclusion in divergent ways. Grotius regards the contract in favour of a third party after the acceptance of the *accipiens* to be some kind of offer towards the third party, who by accepting it can enter into the contract in his favour, whereas the other authors substantiate their opinion with other dogmatic constructions: the *accipiens* is the third party's representative or the contract between *promittens* and *accipiens* results in an enforceable nude pact between *promittens* and the third party. The underlying construction has an important consequence. If we assume that some kind of agency takes place or that third party contracts result in enforceable obligations towards the third party, this by itself sufficiently explains the existence of an action for the third party. However, if we assume that third party contracts merely result in an offer towards the third party, as a matter of fact, the latter will have to accept this offer, before he can have an action at his disposal. Thus, there is also this difference, that according to Grotius the third party has to accept the *promittens'* offer, whereas the other authors do not require this. Yet, this need not be a contradiction between the several theories, at least not between Grotius on the one side, and Groenewegen and van Leeuwen on the other. After all, Grotius requires the explicit acceptance by the third party, irrespective of the Roman requirement that the *accipiens* must have an interest. We may not exclude, in view of the fragment in the *Inleidinge* as discussed, that for the exceptional cases where the *accipiens* does have an interest, acceptance is not required. On the other hand, Groenewegen and van Leeuwen are, by making a presumption, adopting one of the exceptional cases of Roman law where the third party contract is valid as the standard case. It is possible that also Grotius would not have required here an acceptance by the third person.

Let us now turn to one of the later authors of Roman-Dutch law, the Leyden professor Dionysius Godefridus van der

Keessel (1738-1816). His *Theses Selectae*, first published in 1800, contains a remark related to *Inleidinge* 3.3.38, which deals with the case where someone stipulated in favour of a third party. This third party had not ordered him to do so, but nevertheless seems to consent. Here, van der Keessel maintains that in order to acquire a right, the third person must accept the promise, unless he is a notary. Subsequently he refers to Grotius, whom he supports against the doctrine of Groenewegen and Voet, in the opinion that apart from these cases the third party does not acquire a right. The authority of Groenewegen and Voet is not capable of overruling the nature of things, prescribing apparently that acceptance is a necessary condition for the acquisition of a right, in case the third party had not ordered the *accipiens* to act in his favour.

Dionysius Godefridus van der Keessel, Theses selectae, nr. 510 (ad *Inleidinge* 3.3.38) [43]

Ex promissione tertio facta, in quam tertius ille sine mandato consensit, is, cujus interest, jus quidem acquirit, si deinceps promissionem acceptat, aut tertius ille, qui sine mandato consensit, sit persona publica, veluti Notarius. Sed extra hos casus, ei, cujus interest, non acquiri jus, recte Grotius docet, non ex juris civilis subtilitate, sed ex ipsa rei natura, quam, deficiente consuetudine, vincere non potest Groeneweg. et Voetii, *ad t. D. de Verb. Obl., no 3*, aliorumque dissentientium auctoritas.

Van der Keessel is dealing here with cases where the *accipiens* is acting of his own accord. This may be a similar distinction as the one of Grotius. Acting by order of the third party corresponds to some kind of representation, whereas stipulating without any order implies a contract in favour of the third party. For the latter category Grotius requires generally the acceptance by the third party, but this irrespective of the requirement of Roman Law that the *accipiens* must have an interest. However, as we have seen, Groenewegen and van Leeuwen are merely dealing with the latter category. They do not pronounce upon the requirement of acceptance, but this only for cases where the *accipiens* does have an interest or is, anyhow, presumed to have one.

VI. Case-law of the Supreme Court of Holland and Zealand

Were the teachings of Grotius and the doctrine of Roman-Dutch jurists concerning contracts in favour of a third party authoritative in the United Provinces? Did they influence legal practice? In order to answer this question I would like to pay attention to a sentence of the Supreme Court (*Hooge Raad*) of Holland and Zealand, dated October 27, 1733.

It may be noted here that the decisions of the Supreme Court and the underlying reasons were not officially recorded, but merely preserved in the collections of private notes made by two councillors of the court, viz. the *Observationes tumultuariae* (hasty notes) of Cornelis van Bijnkershoek (1673-1743) and the *Observationes tumultuariae novae* (new hasty notes) of Willem Pauw (1712-1787), Bijnkershoek's son-in-law. Originally, these notes were not meant for publication. Since sentences of the Supreme Court do not contain any grounds for the judgement, the notes give interesting information on the arguments of the court which would normally have remained secret.[44]

The sentence of the Supreme Court from 1733, as referred to above, deals with a case where the third party is not claiming the performance itself stipulated by the *accipiens* who had died in the meantime. The action is aimed at the *willige condemnatie*, i.e. the sentence already agreed upon by *promittens* and *accipiens* and pronounced by the court. All councillors agree that it is nowadays valid to stipulate for another. According to some of them, however, the third party can only claim the performance itself. According to the majority stand, the third party may even demand execution of the agreed judgement. To substantiate this opinion a comparison is made with the case where the creditor had ceded his contractual rights including the execution of the agreed judgement to the third party and the case where the principal's affairs had been managed by contracting under an agreed judgement. The majority of councillors is apparently prepared to assume that in case of third party contracts, not only the performance due to the third party, but all rights acquired by the *accipiens* may be considered as transferred unto the third party, and this even implicitly.

Cornelis van Bijnkershoek, *Observationes Tumultuariae*, nr. 2792 [45]

Inter Titium et Maevium de variis capitibus transactum est, interque eos inter alia convenit, ut Titius tribus sororibus, peregre habitantibus, quotannis, donec viverent, solveret certam pecuniae summam. Haec transactio corroborata est voluntaria condemnatione. H.R. Maevio defuncto, et Titio non solvente illam pecuniam annuam, tres illae sorores voluntariam illam condemnationem executioni mandant apud H.R. Adversus illam executionem Titius ab H.R. implorat mandatum poenale, ajens illam transactionem, et secutam postea condemnationem non intercessisse nisi inter se et Maevium, Maevium, igitur, si viveret, solum ex ea condemnatione agere posse, non posse tres illas sorores, quia inter se et eas nulla intercedebat condemnatio. Et sic quoque nonnulli Senatores sapiebant, rati, hodie, quidem alterum alteri stipulari posse, sed non alio effectu, quam ut is, cui stipulatum erat, id petere possit bij R.A. Sed plures Senatores putabant, voluntariam illam condemnationem etiam, sororibus illis prodesse, nam et eum, cui a creditore jus cessum est, posse voluntariam condemnationem, si qua sit inter creditorem

> et debitorem, executioni mandare, posse et eum, cujus negotia gesta sunt, si pro eo contraxit negotiorum gestor sub voluntaria condemnatione H.R., licet uterque ipsa condemnatione comprehensus non sit. Largiebantur alii id verum esse, si is, qui agit ex voluntaria condemnatione, repraesentat personam ejus, qui contraxit, ut in utroque, quod dixi, exemplo, sed tres illas sorores non repraesentare personam Maevii defuncti. Plurium tamen sententia vicit 27 Octob. 1733 denegandum esse mandatum poenale.

It is clear that Roman-Dutch law did not abrogate the Roman rule of law that no one can stipulate for another, but rather that the maxim both in theory and practice had lost a lot of its significance. Actually it was accepted to stipulate for a third party, resulting for this third party in an enforceable right. There were several dogmatic solutions possible to explain the right of the third party. The most important ones are the presumption of a cession between *accipiens* and the third party and the idea that the third party contract is an offer towards the third party, which the latter may accept and become a party to.

It has to be seen now in which way Roman-Dutch law as regards the third party contract has influenced the Dutch codification of civil law in the nineteenth century, and whether or not this was altered by the new Civil Code, promulgated in 1992.

VII. Later developments in the Netherlands

In 1811 the French occupier introduced the *Code Napoleon* in the Netherlands. As already noticed, article 1121 of this Code accepted the validity of contracts in favour of a third person only in two exceptional cases, viz. when the *accipiens* at the same time stipulates for himself and when the performance towards the third party is a condition added to a donation. The French legislator had not adopted existing French customary law, where third party contracts were generally accepted, but had followed the doctrine of Robert Joseph Pothier (1699-1772). This jurist maintained that it is merely possible to stipulate for another in a limited number of exceptional cases.[46] After the French had been driven away from the Netherlands, the *Code civil* remained in force, but in the meantime new drafts of a civil code were composed in order to replace the French legislation. The two drafts by Joan Melchior Kemper (1776-1824), dating from 1816 and 1820, seem to be inspired by the doctrine of Grotius. Parties are free to stipulate for a third one. The *accipiens* acquires a right, if a penalty-clause is inserted in the contract or if he himself has a financial interest in the performance. The third party, in his turn, is entitled to accept the promise stipulated in his favour. After doing so, he is presumed to have entered into the contract with the *promittens*. As a consequence, he derives his right directly from the contract and not from the *accipiens*.

As in so many respects the Netherlands Civil Code, the *Burgerlijk Wetboek*, which eventually came into being in 1838, did not follow the drafts by Kemper as regards the third party contract, but adopted the restricted phrasing of art. 1121 of the French *Code civil*. According to article 1353 of the *Burgerlijk Wetboek* of 1838 the contract in favour of the third party is valid only in exceptional cases.

> ***Burgerlijk Wetboek* (1838), art. 1353** [47]
>
> Men kan ook ten behoeve van eenen derde iets bedingen, wanneer een beding, hetwelk men voor zich zelven maakt, of eene gift die men aan een ander doet, zulk een voorwaarde bevat.
>
> Die zoodanig een beding gemaakt heeft, kan hetzelve niet meer herroepen, indien de derde verklaard heeft daarvan te willen gebruik maken.

What the origin of the third party's action is, would from that time onwards be disputed in the scholarly literature. The article itself did pronounce upon the way the right of the third party was acquired in the cases mentioned. According to some jurists we should assume that some kind of cession took place; but according to others the right was directly derived from the contract itself through acceptance by the third party.

In the new Dutch Civil Code, promulgated in 1992, we encounter a totally different approach. After accepting the condition in his favour, the third party is generally entitled to the performance and capable of suing one of the parties to the contract.

> ***Burgerlijk Wetboek* (1992), art. 6:253** [48]
>
> 1. Een overeenkomst schept voor een derde het recht een prestatie van een der partijen te vorderen of op andere wijze jegens een van hen een beroep op de overeenkomst te doen, indien de overeenkomst een beding van die strekking inhoudt en de derde dit beding aanvaardt.
>
> 2. Tot de aanvaarding kan het beding door degene die het heeft gemaakt worden herroepen.

The third party can accept the condition informally and his acceptance has three important consequences: he acquires a right, he becomes party to the contract and the condition in his favour can no longer be revoked.

There are some important differences between this contract in favour of a third party and the acquisition of rights by means of representation. The agent, acting in the name of his principal, is not a party to the contract, while the *accipiens* stipulating in favour of a third party is. The principal becomes party to the contract at the moment his agent reaches the agreement, while the third party only does after his own acceptance. The contract entered into with the agent of a principal cannot be

revoked, whereas the contract in favour of a third person can be revoked until the moment of acceptance.

In legal practice we encounter nowadays many examples of agreements in favour of a third party. In contracts concerning the transport of goods one can stipulate a right to delivery for the addressee. An employee may stipulate payment of widows' and orphans' pensions in case he dies. An association may stipulate rights for its members. Moreover, one can contract a life insurance in the favour of a third party and, finally, there is also the perpetual clause which grants the original alienator a right towards third or later acquirers.

It may be clear that both the Roman maxim *alteri stipulari nemo potest* and the teachings of Pothier are nowadays replaced by the general acceptance of the third party contract. Somehow our legislator decided after a period dominated by alien, French law to return to the doctrine of Roman-Dutch law. Undeniable the contract in favour of a third party as found in the Dutch *Burgerlijk Wetboek* of 1992 shows great similarity to the fragment in Grotius' *Inleidinge* as discussed before. In this respect, we can conclude that the spirit of Roman-Dutch law does not only live on in the parts of the world where it was never formally abrogated, such as South Africa and Sri Lanka, but it seems - at least substantially - also to live on in parts of Western Europe.

FOOTNOTES :

1 N.H. Andrews, Reform of the privity rule in English contract law: The Law Commission's report no. 242, in The Cambridge Law Journal 56 (1997), p. 25-28. W. Lorenz, Reform des englischen Vertragsrechts: Verträge zugunsten Dritter und schadenrechtliche Drittbeziehungen, in Juristen Zeitung 52 (1997), p. 105-111 and G.H. Treitel, The law of contract, Londen 199910, p. 538-618. See for the history of privity: V.V. Palmer, The paths to privity; A history of third party beneficiary contracts at English law, San Francisco 1992.

2 Translation: No one can stipulate for another, as was stated above, because these kinds of obligations are invented so that everyone acquires for himself what is in his own interest: but that something is given to another is not of any interest to the stipulator (...). See also Ulp. D. 45.1.38.17 and Scaev. D. 50.17.73.4.

3 The so-called non-genuine contract in favour of a third party: Inst. 3.19.20 and Ulp. D. 45.1.38.20-22.

4 See Inst. 3.19.19, Ulp. D. 45.1.38.17 and Pap. D. 45.1.118.2.

5 However, see D. 50.17.73.4. It is not possible to agree on security for a third party by means of a pactum.

6 See Ulp. D. 13.7.13pr (Cf. Ulp. D. 20.5.7) and D. 19.1.13.30 and C. 4.65.9.

7 Paul. D. 44.7.11 and D. 45.1.126.2 and C. 4.27.1.

8 Pomp. D. 12.1.8, Paul. D. 45.1.126.2 and C. 4.27.3(2).

9 Ulp. D. 13.7.13pr (itp.), Paul. D. 16.3.26pr and D. 24.3.45, C. 5.14.7 and C. 8.54(55).3.

10 Literature: J.P. Moltzer, De overeenkomst ten behoeve van derden, Amsterdam 1876, J.C. de Wet, Die ontwikkeling van die ooreenkoms ten behoewe van 'n derde, Leyden 1940, p. 28-68, G. Wesenberg, Zur Behandlung des Satzes Alteri stipulari nemo potest durch die Glossatoren, in Festschrift Fritz Schulz II, Weimar 1951, p. 259-267, H. Lange, "Alteri stipulari nemo potest" bei Legisten und Kanonisten, in ZSS Rom. Abt. 73 (1956), p. 279-306, U. Müller, Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter, Ein dogmengeschichtlicher Beitrag zur Lehre von der unmittelbaren Drittberechtigung und Drittverpflichtung [Beiträge zur neueren Privatrechtsgeschichte, 3], Stuttgart etc. 1969 and J.A. Ankum, Die Verträge zugunsten Dritter in den Schriften einiger mittelalterlicher Romanisten und Kanonisten, in W.G. Becker-L. Schnorr von Carolsfeld (ed.), Sein und Werden. Festgabe für Ulrich von Lübtow zum 70. Geburtstag am 21. August 1970, Berlin 1970, p. 555-567, reprinted in E.J.H. Schrage (ed.), Das römische Recht im Mittelalter [Wege der Forschung, 635], Darmstadt 1987, p. 116-130.

11 Cf. Paul. D. 1.3.14 and D. 50.17.141pr and Iul. D. 1.3.15. See about the principle of analogy in the glossators: G. Otte, Dialektik und Jurisprudenz, Untersuchungen zur Methode der Glossatoren [Ius commune SH, 1], Frankfurt/M 1971, p. 203-204.

12 Wilhelmus de Cabriano, Casus codicis ad C. 4.27.1 in Düsseldorf E 9a (fol. 205rb) and Hereford P. 5. VI (fol. 135rb) and ad C. 5.14.4 in Düsseldorf E 9a (fol. 221rb-va): (...) ceterum si passim hoc ad consequentias trahere uolueris, uereor ne legem offendas. I thank Tammo Wallinga (Erasmus University Rotterdam) who allowed me to consult his textcritical edition (in preparation) of the Casus codicis.

13 He descended from the noble lineage Gosia and belonged to the Ghibellines, the party which had chosen the side of the Hohenstaufens in their conflict with the Roman Pontiff and which was to be expelled from Bologna one century later. Literature: F.C. von Savigny, Geschichte des römischen Rechts im Mittelalter IV, 18502 (reprint Bad Homburg 1961), p. 124-140; H. Kantorowicz-W.W. Buckland, Studies in the glossators of the Roman law, Newly discovered writings of the twelfth century, Cambridge 1938 (reprint Aalen 1969), p. 86-102; E. Cortese, Il diritto nella storia medievale II (Il basso medioevo), Rome 19983, p. 76-102 and H. Lange, Römisches Recht im Mittelalter I, Munich 1997, p. 170-178.

14 G. Haenel, Dissensiones dominorum, Leipzig 1834, Hugolinus § 256 (p. 428-429).

15 Azo, Summa Codicis, Venice 1581 ad C. 2.3 no. 28 (column 68) and Lectura super Codicem, Paris 1577 (reprint Turin 1966) ad C. 3.42.8 (p. 251-252): (...) Martinus tamen uoluit propter hoc dicere quod semper ex pacto alterius detur utilis actio, et sic dixit generale et non speciale. See also gloss utilis ad C. 3.42.8 and gloss nihil agit ad Inst. 3.19.4.

16 See the phrasing of the gloss utilis ad C. 3.42.8: (...) Item nota, quod ex hac lege dixit M[artinus] ex alterius pacto semper dari utilem actionem (...).

17 Azo, Summa Codicis ad C. 4.27 no. 14 (column 360) and Lectura super Codicem ad C. 4.27.1 no. 5 (p. 306), gloss quaecumque gerimus ad D. 44.7.11: (...) licet Martinus semper dederit ex alterius stipulatione, quia hoc in multis casibus inueniebat, ut (...) and gloss nihil agit ad Inst. 3.19.4: (...) Sed Martinus dicebat hos casus facere regulam: at si quis casus esset contra illud, speciale esset at quod hic regulariter dicetur (...).

18 Azo, Brocardica, Venice 1581, rubrica IIII (De pactis), no. 54 (column 19), gloss nulla ad C. 4.27.1 and gloss nihil agit ad Inst. 3.19.4. According to the gloss adquisita ad C. 4.27.1 by Symon Vicentinus († before 1263) in Oxford BL, Laud. lat. 3 (fol. 90ra) Martinus taught, that the action based upon another person's pactum is not granted iure angusto, but it is de equitate.

19 Also Johannes Bassianus, a student of Bulgarus, (gloss utilis ad C. 3.42.8 en gloss nulla ad C. 4.27.1), Hugolinus and Azo (gloss fieri ad D. 45.1.38.21 and Azo, Lectura super Codicem ad C. 3.42.8) opposed to this view.

20 Azo, Summa Codicis ad C. 2.3 no. 28 (column 68) and Lectura super Codicem ad C. 4.27.1 no. 5 (p. 306).

21 See the gloss potes ad C. 4.50.6 and gloss nihil agit ad Inst. 3.19.4. The gloss plerumque ad D. 2.14.25.2 spreaks about a misconception (error).

22 Azo, Lectura super Codicem ad C. 3.42.8 (p. 251-252) and ad C. 5.14.4 no. 1 (p. 399), Odofredus, Lectura super Digesto veteri II, Lyon 1552 (reprint Bologna 1968) ad D. 13.7.13pr (fol. 57vb) and ad D.

16.3.26pr (fol. 80va), Lectura super Codice ad C. 5.14.4 (fol. 279vb) and ad C. 5.14.7 (fol. 280ra), gloss aut in factum ad D. 13.7.13pr, gloss ex stipulatu ad D. 3.3.27.1 and gloss admiserunt ad C. 8.54(55).3.

23 Azo, Summa Codicis ad C. 2.3 no. 28 (column 68), Lectura super Codicem ad C. 3.42.8 (p. 251-252) and ad C. 4.27.1 no. 5 (p. 306), followed by the gloss nihil agit ad Inst. 3.19.4. Cf. also the gloss plerumque ad D. 2.14.25.2: (...) quod nos negamus, quia aliud in exceptione quaerenda et aliud in actione, ut arg. infra de reg. iu. l. Fauorabiliores (D. 50.17.125) et infra de act. et oblig. l. Arrianus (D. 44.7.47). Thus, according to the Gloss, the fact that the principal debtor has an exceptio doli at his disposal because of the agreement between the surety and the creditor, is no argument to grant an action.

24 With reference to Ulp. D. 45.1.45.2 the Gloss remarks that it makes little difference whether you bring an actio directa or an actio utilis. See the gloss nihil agit ad Inst. 3.19.4: (...) dicebat iure directo non ualere, sed utiliter acquiri posse. Et sic secundum eum semper ex pacto alterius quaeritur. Quod falsum est, cum parum interesset, directo an utiliter queretur, ut ff. de ne. gest. l. Actio (D. 3.5.46(47)).

25 Azo, Brocardica, rubrica IIII (De pactis), no. 54 (column 19): (...) Martinus uero ex aequitate cordis sui dicebat dari utilem actionem ex alterius pacto.

26 Azo, Lectura super Codicem ad C. 3.1.8 no.3: (...) praeterea intellige de aequitate quae in lege reperitur, non quod de suo corde liceat inuenire. (...) (p. 167). Cf. Haenel, Hugolinus § 91 (p. 330).

27 The gloss equitate ad Coll. 3.4 (Nov. 17.3): (...) hoc facit pro M[artino] qui dicebat secundum aequitatem et conscientiam iudicandum (...).

28 See Haenel, Adcessio II § 19b about the action for the builder in good or bad faith on another man's plot of land (p. 574) and Azo, Summa Codicis ad rubr. C. 3.32 no. 26 (column 209).

29 Odofredus, Lectura super Digesto veteri I, Lyons 1550 (reprint Bologna 1967) ad D. 3.2.4.5: Martinus de sua ficta equitate et bursali propter quas passus est multas uerecundias (...) (fol. 101rb). See this anonymous remark on the summula 'Placuit' of Placentinus in Paris, BN lat. 4603 (fol. 89rb), edited in Pescatore, Miscellen, note to line 26 on p. 8-9: Nota quod non quandoque iudicem minorem esse lege (...) et equitatem debet habere pro occulis ut (...) non tamen bursalem ut (...). Cf. also Cortese, La norma II, p. 321 note 42.

30 Cf. Bartolus, Super prima Digesti veteris commentaria, Venice 1526 (reprint Rome 1996) ad D. 2.14.1 no. 3 (fol. 85ra): (...) Sed contra, quia semper uidetur mea interesse. Nam si tu promittis mihi quod dabis Titio, perinde est ac si facerem Titium meum procuratorem ad recipiendum et possum postea illum Titium prohibere, sicut procuratorem meum (...).

31 Edition F. Dovring, H.F.W.D. Fischer, E.M. Meijers, Leyden 1965, p. 213, translation: But merely stipulating or accepting something for a third person (except for those who can acquire a claim by the act of another, as discussed above) is void, unless this takes place in God's service, or for the benefit of the poor, or unless the accipiens himself has an interest, or a penalty is imposed upon the promittens for the case he does not perform. But, because we hold more stock by equity than by the sharpness of the law, also apart from these exceptions the third party may accept the promise and by doing so acquire a right, unless the promittens had revoked his promise before the acceptance by the third person took place.

32 The distinction is derived from the Spanish theologian and canonist Diego Covarruvias y Leyva (1512-1577) as Grotius indicates in the reference. Cf. his commentary on the canon Quamvis pactum of the title de pactis of the Liber Sextus, pars 2 § 4 no. 13, in Didacus Covarruvias a Leyva, Opera omnia, Tom. I, Frankfurt 1599, p. 313-314.

33 Edition B.J.A. de Kanter-Van Hettinga Tromp, Leyden 1939, reprint with additions Aalen 1993, p. 337-338; translation: Disagreements also arise concerning the acceptance (of a promise) in favour of a third party. We should distinguish between the promise made to me to give a thing to a third party and the promise directed to the name of the one to whom the thing should be given. If the promise is made to me, it seems that - omitting the investigation whether I have a personal interest, as introduced by Roman law - when I accept it, the right is given to me by nature to effect that the right is passed on to the third person, if he also accepts it; and this in such a way that the promise in the meantime cannot be revoked by the promisor, but I, to whom the promise has been made, am capable of remitting it. Because this opinion is not contrary to Natural Law, and matches perfectly such a phrasing of the promise, I have no interest at all, if another acquires a benefice through me.

34 B. Beinart (ed.), Groenewegen, De legibus abrogatis (on abrogated laws), Volume I, Johannesburg 1974, p. 76; translation: 1 No one can stipulate for another. 2 because these kinds of stipulations or obligations are invented for everyone to acquire for himself what is in his own interest: but that something is given to another, is not of any interest to the stipulator. 3 What a futile reason. Charity does not seek itself, see 1 Corinthians 13.5. Why, thus, are such stipulations invented for this reason, that everyone acquires merely for himself? Moreover, it is a misconception that if something is given to a third party, the stipulator has no interest, because it is of interest for a man that his fellow man is provided with a benefice, as is stated at the end of D. 18.7.7 and a further argument can be found at the end D. 1.1.3, and nobody is such a fool that he stipulates for a third party, unless he thinks also he himself has an interest.

35 Beinart, op. cit., p. 76; translation: 4 Thus one can imagine another explanation for this text, viz. that the stipulator can acquire no obligation from the stipulation made in favour of another, because this was not the purport of the transaction; neither can the third party, because no stipulation took place between him and the promittens. Thus, towards him the promise afore-mentioned is merely a nude pact, which on basis of civil law can by no means give birth to an action, see C. 2.3.10 (...). 6 But subsequently according to modern customs an action can be granted based on a nude pact, as I mentioned in my commentary on C. 2.3.10 afore-mentioned, and by stipulating for another an obligation is acquired; see Grotius, Inleidinge, 3.3.38 [78] and De iure belli ac pacis, book 2, chapter 11, num. 18, Covarruvias, ad Quamvis, de pactis, part. 2 § 4 num. 2, Faber, Codex Fabrianus, lib. 4 tit. 34, defin. 1, Gutierrez, Practicae quaestiones, lib. 3, quaest. 97 num. 7, Gomezius, Resolutionum tomus 2, c. 11 num. 20, towards the end, Charondas, Responses, lib. 6, resp. 46. See also Zypaeus, Notitia Juris, De contrahenda et commit. sipulatione, Vinnius, commentary on Inst. 3.19.4, num. 3, Rittershusius, De differentiis juris, lib. 3, c. 6, the scholars here and in their commentary on C. 45.1.38.17, Gabrielis, Conclusiones, lib. 3, ad D. 45.1, concl. 1, and what I have said in my commentary on C. 4.27.1 and C. 4.50.6.

36 See Simon Groenewegen, De legibus abrogatis, Justiniani Institutiones Bk. 3, tit. 19, § 19 n. 7; Cf. Beinart, op. cit., p. 77.

37 S. van Leeuwen, Censura Forensis, Lib. IV, cap. 16 (de verborum obligatione) n. 8 (in fine), edition Leyden 1741, p. 404: (...) eidemque tanquam solutioni adjecto non modo recte solvitur, sed et actionem habet is, qui syngraphum bona fide possidet, qui consideratur tanquam procurator in rem suam (...).

38 In van Leeuwen's later work Het Roomsch Hollandsch Recht (1675) such or a similar opinion can no longer be found.

39 Edition Leyden 1741, p. 404; translation: No one can stipulate for another, unless he has an interest (...) or a penally-clause is added. It is true that nowadays an effective action is granted because of a pactum nudum, as we have demonstrated in the passage concerned, although according to subtle law, the accipiens does not acquire anything from the stipulation made for another, because he does not seem to have done this, neither does the other, because no stipulation took place between him and the promittens. And yet, because nobody is presumed to stipulate for a third party, unless this is also in his own interest, it suffices to act in such a way; (...) by stipulating for another an effective obligation and action is acquired in the same way as if another person is added in view of the payment; (...). However, Carpzovius disagrees, where he denies that the third party acquires something for that reason. (...).

40 Cf. Inst. 3.19.4: (...) plane solutio etiam in extranei personam conferri potest (...).

41 J. Voet, Commantarius ad Pandectas, pars posterior, The Hague 1704, p. 917; translation: (...) According to contemporary customs it

holds that everyone can stipulate for another just as for himself, so that also the principal is allowed to bring an action because of the stipulation of his agent, even if this action is not ceded to him by his agent (...).

42 J. Voet, Commantarius ad Pandectas, pars posterior, The Hague 1704, p. 917; translation: and, subsequently, although according to civil law, in the case where someone stipulates for himself or for Titius, the obligation and action seem to be merely acquired by the stipulans and not by Titius, (...) nowadays in such cases where Titius is added, not only payment to him can correctly take place, but he also acquires an action for the entire amount; or for a part, if someone had stipulated for himself and Titius and nothing takes place more frequently between merchants, than that it is stipulated not only that he himself is paid, but also another, for example, the holder of a promissory note or an exchange bill (...).

43 D.G. van der Keessel, Theses selectae, Amsterdam 1860, p. 142; translation: By the promise to a third party, agreed upon by this third party without any order, the one who has an interest acquires a right, if he subsequently accepts the promise, or this third person, who agreed without order, is a public figure, for example, a notary. Apart from these cases Grotius rightly teaches that the one who has an interest cannot acquire a right. This does not result from the subtlety of Roman law, but from the nature of the thing itself, which cannot be put aside by the authority of Groenewegen and Voet in their commentary upon D. 45.1 (no. 3) and of other dissenting authors, because deviating customary law is lacking.

44 The notes were discovered last century by the Leyden professor E.M. Meijers.

45 Edition Meijers e.a., Tom. III, Harlem 1946, p. 569; translation: Titius and Maevius made a transaction on various subjects and agreed among other things that Titius would annually pay a certain amount of money to their three sisters, living abroad, as long as they would live. This transaction was confirmed by an agreed judgement. Supreme Court. After Maevius died and Titius no longer paid the yearly amount, the three sisters claimed execution of the agreed judgement before the Supreme Court. Titius requested from the Supreme Court a mandament poenaal (here some kind of writ containing an order under a penalty-clause not to execute the agreed judgement) against such an execution, stating that this transaction and the subsequent agreed judgement was only established between him and Maevius, that only Maevius, if he would live, could sue him on the ground of the judgement, and that the three sisters were not entitled to do this, since the judgement was not established between him and them. And indeed also some of the councillors were of the opinion that nowadays it is valid that someone stipulates for another, but to no other effect, than that the one for whom is stipulated, can claim this in Court. But a majority of the councillors was of the opinion that this agreed judgement also benefits the three sisters because also the one, to whom the creditor had transferred his right through cession, could claim the execution of a judgement, agreed upon by creditor and debtor, just as, according to the Supreme Court, the one whose affairs were managed, when the manager of his affairs entered into a contract under an agreed judgement, although neither of them was party to this agreed judgement. The others admitted that this is true for cases where the one claiming execution of the judgement is a representative of the party to the contract, but the three sisters did not represent the deceased Mevius. However, the opinion of the majority prevailed and the mandament poenaal was denied on October 27, 1733.

46 Traité des Obligations no. 57-69, in Oeuvres de Pothier (ed. M. Bugnet), Tome II, Paris 1848, p. 34-39.

47 Translation: One can also stipulate for a third party when a stipulation one makes for oneself or the gift made to another contains such a condition. The one who makes such a stipulation is not capable of revoking it when the third party has expressed the wish to make use of it.

48 Translation: 1. A contract results for the third party in the right to claim a performance from one of the parties or, in another way, to appeal to the contract towards one of them, if the contract contains a condition with such a purport and the third party accepts this condition. 2. Until acceptance the condition can be revoked by the one who made it.